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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1959

No. 951

THE STATE OF NEW JERSEY,
*Respondent,*

vs.

ERNEST GRAZIANI, *et als.*,
*Petitioners.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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IN THE

# Supreme Court of the United States

**October Term, 1959**

**No.**

THE STATE OF NEW JERSEY,

*Respondent,*

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ERNEST GRAZIANI, *et als.*,

*Petitioners.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Halsey Packard Inc., a corporation, Halsey Automobile Co., James Graziani and Ernest Graziani, *et als.*, respectfully petition, by their counsel, Joseph A. Pennica and Gilbert L. Offenhartz, for a writ of certiorari to review a decision of the Supreme Court of the State of New Jersey, 31 N. J. 538, rendered February 22, 1960, which affirmed judgments of conviction in criminal action instituted on an indictment presented to the Law Division of the Superior Court of the State of New Jersey, in and for the County of Essex.

# I.

## Summary Statement of the Matter Involved.

### A. Identity of Defendants-Appellants.

ERNEST GRAZIANI.

Ernest Graziani is president of Halsey Packard, Inc. and Halsey Automobile Co. (D599a-9). He is also the owner of all of the stock of both these corporations (D599a-15). His brother James Graziani is the registered owner of one share of stock in each of the corporations. This stock ownership is merely to qualify him for election as a director (D577a-15 to 25).

JAMES GRAZIANI.

James Graziani is one of the Board of Directors and is secretary of Halsey Packard, Inc. and Halsey Automobile Co. (D599a-10). He is also a salaried employee of Halsey Packard, Inc. (D599a-16).

HALSEY PACKARD, INC.

Halsey Packard, Inc. is a New Jersey corporation. It is a franchised Packard Dealer (D579a-2). It also sold other makes of new and used cars (D579a-2). It conducted an extensive advertising program through newspapers, radio and television (D26a-5 to 25).

HALSEY AUTOMOBILE CO.

Halsey Automobile Co. is a New Jersey corporation. It is not a franchised dealer. It sold various makes of new

and used cars from October, 1956 through March of 1957. It never advertised in the newspapers, on radio or television (Exhibits S-1, S-2, S-3, D-14).

**B. History of Case.**

The May 1957 term of the Essex County Grand Jury returned an indictment against twenty-one defendants for conspiring to obtain money by false pretenses from members of the general public, particularly purchasers and prospective purchasers of motor vehicles.

Before the trial of the case, and on or about July 24, 1959 and July 26, 1957, the Prosecutor distributed to witnesses of the matters laid within the indictments an official notification in the form of a letter, which implied to the witnesses that they should have no interviews with and give no statements to any of the defendants or their attorneys or investigators except at the office of and in the presence of the Prosecutor, and the letter further implied that the request of a defendant or his representative for such a statement or interview would be an improper act.

Thereafter, on September 13, 1957 the defendants filed a Joint Petition for an Order to Show Cause why testimony should not be introduced to show why the indictments should not be quashed. On the return day of the Order to Show Cause the defendants offered testimony to show that the harm done by the letter was deep, thorough, lasting, ineradicable, irrevokable, inalterable, permanent and irremediable (JM 47-9 to 18).

The trial judge refused to take any testimony or depositions as to the performance or irremediability of the harm

And upon final review by the Supreme Court of New Jersey wherein the constitutional question was again argued (Appellant's Brief to Supreme Court, pp. 93-27 to 94-40), that Honorable Court affirmed in a memorandum decision.

D.

Where in a criminal case prosecutor has acted in such a way as to prevent counsel for defendant from preparing his defense, the refusal of the trial judge to receive testimony which could show the irreparability of the damage done by the prosecutor's actions, which damage if it were irreparable would prevent defendants from receiving a fair trial according to the guarantee of the due process clause of the 14th amendment was itself an error amounting to denial of due process of law.

The conclusion of the New Jersey Supreme Court that the trial court was correct is at variance with the decisions and principles announced by this Court.

E.

The following cases are believed to sustain jurisdiction.

*Lyons* v. *Oklahoma,* 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481; *Brownfield* v. *South Carolina,* 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 882; *Martin* v. *Texas,* 200 U. S. 316, 319, 26 S. Ct. 338, 50 L. Ed. 497.

## III.

## Question Presented.

The question presented is a narrow one:

Does the refusal of a trial court to hear testimony as to the irreparability of damage done by a prosecutor by intimidating and biasing witnesses in a criminal case, which damage if it were irreparable would preclude defendant from having a fair trial according to due process of law, amount in itself to a denial of due process of law by the trial court?

## IV.

## Reasons for Granting the Writ.

The action of the Prosecutor in sending out letters to the witnesses may have violated the defendants' rights under the due process clause of the Federal Constitution and certainly did if the action caused irreparable damage by uneradicably biasing and intimidating witnesses. *Lyons* vs. *Oklahoma*, 322 U. S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481.*

The State agrees with the general proposition offered as to due process and the right of a defendant to interview witnesses (p. 94, State Brief to N. J. Supreme Court).

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* See *State* v. *Tune*, 13 N. J. 203, 234, dissent by Brennan, *J.*, where he said:

> "To shackle counsel so that they cannot effectively seek out the truth and offer the accused the representation which is not his privilege but his absolute right, seriously imperils our bedrock presumption of innocence."

The trial court itself found that the letter had "some tendency to put the defendants in an unfair, difficult position in preparing for trial." (p. 92, 16 of State Brief to N. J. Supreme Court).

But while finding thus, and without hearing testimony which was offered, the trial court determined that the harm done was not so irradicable that it could not be corrected or that the indictment should be quashed.

To so decide without hearing testimony as to the harm done is, can, and will be in the future, not merely in New Jersey but elsewhere a means of permitting the prosecutor to intimidate witnesses, suppress evidence, and shackle counsel without having testimony of their unfair action or the harm done by them brought into the open for proper judicial consideration of the facts.

To refuse to take testimony as it did, was a clear denial of defendants' rights under the due process clause. In *Martin* vs. *Texas*, 200 U. S. 316, 319, 26 S. Ct. 338, 50 L. Ed. 497 (following leads offered by *Brownfield* vs. *State of South Carolina*, 189 U. S. 426, 23 S. Ct. 513, 47 L. Ed. 882 and *Brown* vs. *Mississippi*, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082, this court said:

> "• • • upon the hearing of the written motion to quash the indictment, the facts stated in the motion had been established by affirmative proof, or if the trial court had refused to admit evidence to prove them, we should not hesitate to reverse the judgment.
>
> "• • • We are unable to hold upon this record that it was error to overrule the motion to quash; for as already stated it does not appear that the facts stated in those motions were established by evidence,

> *or that the accused*, after filing his motions, made any separate offer to prove them by witness or was denied the opportunity to make such proof." *

The issue in this case is not merely whether or not the prosecutor by his actions deprived the petitioner of the protection of the due process clause of the 14th Amendment which petitioner urges that he did, but whether or not, a court in refusing to hear testimony to prove the facts of the allegations concerning the actions of the prosecutor itself denied due process of law to a defendant.

Petitioner believes that the questions and issues presented here, although very narrow, are of extreme importance to the continued preservation of the rights of defendants against overzealous prosecutors in criminal cases. It is not as uncommon as we would like to believe that prose-

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* See *Haraway* v. *State*, 202 Atl. 845; 53 S. W. 2d 161, 163, where the Court said:

> "The request to be permitted to offer testimony to support the motion was made before trial began, and we think it was in apt time, and that it was an abuse of discretion to deny appellant this right. He did not stand upon his motion, as the defendant in Brownfield v. South Carolina, 1890 S 426, 23 S. Ct. 5B 47 L. Ed. 882, in which case it was said: 'It is suggested that the allegations of the motion to quash, not having been controverted and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does not require a written answer. It appears from the grounds on which the judge decided it, apart from anything else, that the allegations were controverted, and under such circumstances it was necessary for the defendants to make an attempt to introduce evidence * * *.'
>
> "* * * We think the refusal of the trial court to permit the appellant to introduce testimony in support of the allegations of his motion, made before trial began, was error and for the error, judgment will be reversed and the cause remanded. * * *."

cutors intimidate and bias witnesses in a criminal case by advising them to give no information to the representatives of the defendants.

## V.

## Conclusion.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of New Jersey, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of said Supreme Court of New Jersey, be reversed by this Court, and for such other and further relief as this Court may deem proper.

Respectfully submitted,

JOSEPH A. PENNICA,
*Counsel for Petitioners.*

Dated: May 20, 1960.

GILBERT L. OFFENHARTZ,
*of Counsel.*

# APPENDIX

## Opinion of Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

No. A79 September Term 1959

THE STATE OF NEW JERSEY,

Plaintiff,

vs.

ERNEST GRAZIANI, et als.,

Defendants-Appellants.

Argued February 8 and 9, 1960. Decided February 22, 1960.

On appeal from a judgment of the Superior Court, Appellate Division, whose opinions are reported at 60 N. J. Super. 1.

MR. JOHN E. TOOLAN and MR. SAM DENSTMAN argued the cause for the appellants (Messrs. Toolan, Haney & Romond, attorneys).

MR. SANFORD M. JAFFE, argued the cause for the respondent (Mr. Brendan T. Byrne, attorney).

PER CURIAM

The judgment is affirmed for the reasons expressed in the majority opinion of Judge Freund in the court below.

## Judgment

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 2933

THE STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

ERNEST GRAZIANI, et als.,
Defendants-Appellants.

This cause having been duly argued before this Court by Mr. John H. Toolan and Mr. Sam Denstman, counsel for the appellants and Mr. Sanford M. Jaffe, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-second day of February, 1960.

JOHN H. GILDEA,
*Clerk of the Supreme Court.*

Filed
Feb 22 1960

JOHN H GILDEA
Clerk